93-776

Supreme Court, U.S.
FILED
JUN 7 1993
OFFICE OF THE CLERK

In the Supreme Court

OF THE

United States

TERM, 1993

HERBERT ADOLPH,
Petitioner

v.

LEHMAN BROTHERS KUHN LOEB, INC.
CALIFORNIA STREET, SAN FRANCISCO,
Respondents

On Petition for a Writ of Certiorari to the United State Court of Appeals for the Ninth Circuit

WRIT OF CERTIORARI

HERBERT ADOLPH
2925 Cabrillo
San Francisco, CA 94121
(415) 753-3334

QUESTIONS PRESENTED FOR REVIEW

1. Did the court of appeals, by affirming the District Court on the matter on jurisdiction, Departed from the accepted and usual course of judicial proceeding?

2. Did through a series of incorrect rulings denied jurisdiction to a foreign national in pro sa?

LIST OF PARTIES

German Embassy, Washington D.C.

TABLE OF CONTENTS

Page

Questions presented for review i

List of parties ii

Table of contents iii

Table of authorities iv

Statement of the case 1

Argument 2

1. The courts below did not adhere to the accepted and usual course of judicial proceedings

2. The rulings were incorrect. This case did not go to trial in the District Court. An Appeal was filed November 1992 and was denied for lack of jurisdiction by appellate judges Browning, Rymer, Kosinskyt

Summary Arguments 7

Conclusion 15

TABLE OF AUTHORITIES

Cases

Fahy v. Connecticut 375 U.S. 85 (1983)

Salveson v. Western States Bankcard Ass'n, 525 F. Supp. 566, 584 (N.D. Cal. 1981) (Schwarzer, J.), affirmed, 731 F.2d 1423, 1430 (9th Cir. 1984)

(Gold V. Los Angeles Democratic League (1975)

122 Cal.Rptr. 732, 49 C.A. 2d 123

nondisclosure by fiduciary of relevant matter arising from the relationship 152 Cal. Rptr. 776, 89C.A., 3d, 706

Sprindle v. Chubb/Pacific Indemnity Group (1979) established one form of constructive fraud.

Jagiella v. Jagiella, 647 F.2d 561, 563 (5th Cir. 1981).

Rice/ Hobb Act 1,2

United Mine Workers v. Gibbs 1

Rule 12 b 12 U.S.C, Section 18, 19 (b) 23 F.D.I. v. Claycomb

Mothersill D.I.S.C. Petroleos Mexicanos 5

Juristriction Finley, 109 sct (distinguished pentent) for ancylery

Juristriction conspiracy 5

Court Rule 2 5

Federal Rule 103 (a) Westwood

Chemical in v

No. 92-16986

In the Supreme Court

OF THE

United States

TERM, 1993

HERBERT ADOLPH,
Plantiff,

V.

LEHMAN BROTHERS KUHN LOEB, INC.
CALIFORNIA STREET, SAN FRANCISCO,
Respondents

On Petition for a Writ of Certiorari to the United State Court of Appeals for the Ninth Circuit

---

PLANTIFF'S BRIEF TO THE WRIT OF CERTIORARI

STATEMENT OF THE CASE

Herbert Adolph is a German citizen living in San Francisco and the supreme court has jurisdiction within the rule of 17-1 (diversity). In 1980 Adolph had a margin account with Leahman Brothers. Mr. Adolph lost about $500,000 in various tradings. Adolph filed a complaint in district court.

Lehman Brothers chose and selected all stocks. Adolph did not select the stocks that Lehman suggested. Lehman is a culprit by selling useless stock to trusting clients. The status of limitation does not run while the case is on appeal to the supreme court in 1986.

ARGUMENT

A claim for break of fiduciary duty is a claim for fraudulent concealment of facts. Stalberg, supra, 230 Cal. App. 3d at 1230. Therefore, the pleading requirements for discovery of fraud are applicable here.

His claim under California law cannot be barred elements of fraud, he is pleading the elements of fraud conspiracy deception and diligence. He had no knowledge of the operating fact.

During his first trial against Lehman Brothers Adolph tried to sequest or request a document. Lehman Brothers had in their possession in regard to the Marion & Equity Oil Company. Lehman Brothers never furnished any information to the bankruptcy of Marion and Equity Oil.

The essential elements of reach of fiduciary duty by Lehman and Brothers. Therefore his claim for relief is not barred. A fifth claim for relief under Rico Adolph tried with all diligence to discover pertinent facts. Lehman Brothers misled Adolph by not furnishing any documents.

He is pleading under California Law an action for fraud as a plantiff. He had NO knowledge of operating facts. Lehman 3denied any information in regard to equity oil and Marion

Corporation Bankruptcy. He exercised reasonable diligence.

Therefore under California law and action for fraud is applicable. He is making a reference to RICO and the Hoobs act.

"Plantiff under the RICO statutes, is asking for Summary Judgment of $500,000. We have facts supporting this case. I used to be a significant stockholder of Marion Corporation which went bankrupt. I am filing a class action suit for numerous other stockholders who lost their lifetime savings. Lehman Brothers manipulated the shelf inventory resulting in bankruptcy of Marion Corporation and the loss of millions of dollars and Equity Oil They manipulated their shelf inventory of Equity Oil, they sold it to trusting clients when they knew it would go bankrupt. Another bankruptcy could not have been happenstance."

Adolph makes factual allegations identifying the requisite "enterprise" and "predicate acts" are not absent from his complaint. The factual allegations were the proximate caused by a RICO violation. Accordingly, the claim for relief for RICO violations cannot be dismissed.

"Constructive fraud" arises from breach of duty by one in confidential or fiduciary relationship to another which induces justifiable reliance by the latter to his prejudice.

(Gold v. Los Angeles Democratic League (1975)
122 Cal.Rptr. 732, 49 C.A. 2d 123

Plantiff will show that the elements of breach are satisfied; that the relationship meets all tests for fiduciary or confidential

relationship and that he was unwittingly induced into unsuitable and speculative stocks to his dire financial prejudice. Furthermore on "fiduciary relationship, breach of duty" Spindle v. Chubb/Pacific Indemnity Group (1979) established that one form of constructive fraud is:

nondisclosure by fiduciary of relevant matter arising from therelationship 152 Cal. Rptr. 776, 89C.A. 3d, 706 (Underlining by plantiff)

This emphasizes the high standard to which a fiduciary is expected to be held. As expert in a high privileged and trusted position inadequate disclosure of relevant information constitutes constructive fraud and Plaintiff will prove in court that on many counts he was not given relevant information, including annual reports, 10-K, any financial analysis at all in spite of fact he was being placed into oil and gas exploration companies, one of which later declared bankruptcy.

The nexus of crux of the Plaintiffs point is that breach was accomplished by acts of omission and nondisclosure by placement into inappropriate and unsuitable stocks for the plaintiffs' financial profile. That know your customer rules of NASD and other laws rules and regulations were violated, breach occurred and the elements for constructive fraud are present.

Several stocks were speculative in nature. Plaintiff was not told of the riskiness of speculative nature. Plaintiff was not told of the riskiness or speculative nature of these stocks. Plaintiff is submitting evidence of the speculative nature of these stocks. The loss in the collapse of these stocks cost

plaintiff his remaining life's equity. Defendant knew plaintiff was man of modest means. Defendants also knew his financial limitations. Know your customer standards were violated. Fiduciary breach occurred. Constructive fraud will also be proven. As a fact, he is partly disable and gets S.S.I. (To put a partly disabled person into a stock that is into oil and gas exploration is fraud.)

Plaintiff's memorandum herby submitted is not intended to be and does not pretend to be a comprehensive treatment of the legal basis of his claim for breach of fiduciary duty and for constructive fraud. It is intended to provide convincing rational for the action in fact and at law for this aspect of plaintiff's claims of wrong doings. Further evidence is being developed, an expert witness is being retained; additional relevant precedence cases are being examined for proper presentation and incorporation into plaintiff's trial preparation materials, memoranda and evidentiary material.

Price performance of Marion Corp.

Comes now plaintiff, Herbert Adolph, to further amplify the price performance of MARION CORP, prior to declaration of Chapter seven - Involuntary Bankruptcy; after which time the stock suffered further drastic declines. The source for this is the Standard and Poor's Industry Reports August 1983 - the last update on Marion Corporation page 3176.

Under the section "STOCK DATA" the price range for each year of Marior Corporation from 1973 through 1982 inclusive is shown. Plaintiff was placed by fiduciary into this stock in November 26, 1980 near the all time high of the corporation 27 and 5/8. A scant seven months later the stock

had collapsed to $11.00 per share, showing how precarious was its position at the time it was recommended.

Plaintiff has stated at length for the Court at the Hearing on July 19th, other reasons for Marions unsuitability as well as in his filed ANSWER with the Court.

Finally Plaintiff wants to rectify an erroneous impression conveyed by defendant's counsel in referring to Marion Corporation as an excellent stock based on Moody's 1984 "seven year score statistic"

This seven year score statistic covers a time period beyond, way beyond the relevant time period of this case, and counsels comments that it showed or indicated Marion as a good company is irrelevant, not based in fact and should be ignored.

The Exhibit was part of the plaintiffs answer on the issue of unsuitability and the graphic portion (lower half) was and is to be used in context with Plaintiff's ANSWER, where, the New York Stock Exchange Composite index NYSE Composite Index was showing slow steady growth (the type of stock plaintiff had told defendants was his goal) while the " Small oil and gas - Miscl." were showing their riskiness - graphically displayed. This contrast is indicative of the disparity between what a suitable stock portfolio for plaintiff could reasonably have been expected to do an what the unsuitable into which Plaintiff was placed did do. The Moody's Exhibit is an example of the generic riskiness of the Oil and Gas small cost in general and Plaintiff's specific stock in particular.

Plantiff prays the Supreme Court concur that defendants counsel's comment on the "seven year score" statistic is

irrelevant and the Plaintiffs position that the Exhibit exhibits well the Unsuitability issue be reinforced and reaffirmed.

SUMMARY ARGUMENTS

1. The Courts Below did not adhered to the Accepted and Usual Course of Judicial proceedings.

As stated in Rule 17.1 we the court "review on write of certiorari is not a matter of right, but of judicial discretion, and should be granted by important reasons.

Adolph's petition presents an important reason for the court to review his case. The Case offers questions of constitutional substance, and conflicts among federal circuits or between federal and state laws. There are issues of general importance. Because of the District Court and the appellate court made the same mistake this court has to supervise the two lower courts. Mr. Adolph is referencing to himself as an alien litigating pro se. Therefore needing the protection of the Supreme Court. In regard to Rico and the jurisdiction of this case. Which the two lower courts had denied.

We have the new body of evidence for wrong doing of conspiracy. This court has jurisdiction and the statues of limitations have not run. Lehman Brothers Manipulated unsuspected investors. This court has to supervise the various wrong doings of this case.

He is asserting diversity of jurisdiction expanding his claims for conversion and breach of fiduciary duty.

The essence of both Fahy and Chapman was that repeated

errors of constitutional magnitude had been made by the court judges and such errors we are not harmless in a light of the "reasonable doubt" standard. The essence of the present case they were similar to constitutional magnitude committed. Adolph is showing the burden of errors effecting substantial rights. Federal Rules of evidence, Rule 103(a); Westwood Chemical, Inc. v. Owens-Corning Fiberglass Corporation, 445 F.2d 911, 918 (6th Cir. 1971) cert. denied, 405 U.S. 917 (1972). This burden Adolph has repeatedly satisfied. There were errors of supreme magnitude which needs this courts supervision.

In 1986, Adolph had these issues against Lehman Brothers:

Issues

- Breach of Contract — Issue Number One
- Breach of Fiduciary Duty — Issue Number Two
- Breach of Covenant of Good Faith — Issue Number Six
- Wrongful Death

These breach issues are supported by the facts, have not been tolled (see Exhibit C, Calendar), and are pleaded in good faith.

JUDICIAL NOTICE

This honorable Court is asked to take Judicial Notice that time and time again in the Federal Court Case (81-4209 SC/ JSB) Defendant's motions to obtain summary judgment were defeated by Plaintiff Adolph. Demurrer are not used in Federal District Courts — Civil.

B. This honorable Court is asked to take Judicial Notice of sworn testimony during trial, upon cross-examination of Defendant's expert witness, by Plaintiff Adolph, in pro per, that stock purchases exceeded $650,000 in a 26-month period.

C. This honorable Court is asked to take Judicial Notice of Plaintiff's appellate brief in its entirety and specifically the Adolph vs. Mihara Financial Comparisons.

D. This honorable Court is asked to take Judicial Notice of Exhibit D-18 — two panels summarizing the transactions and laying a clear foundation to support Plaintiff's Exhibit A in his complaint before this Court. The panel and color photos thereon are facts to support the claims and with an understanding of the theory of churning provided by SEC Release 7743 (see E) and Dennis White Affidavit (see F), become facts sufficient to substantiate the complaint on several issues, including all breaches and thereby defeating the motion to strike and the key component of complaint on demurrer.

PRESUMPTION DECEPTION

Because of the bankruptcy of Marion Corporation and Equity Oil the stock of those companies fell from $24 to $11 to $1 per share.

Even when the stock was falling to the bottom of it's value, Lehman sold the stock to other customers because of the huge losses over $200,000, we had to live on the street in an old van.

Thanks, because of Lehman Brothers, we are homeless, living on the street. We had to sell the house to use the proceeds for the sale of stock which had gone bankrupt, because of the situation Mr. Axel Kaun got several strokes.

We have to live in an old warehouse without heat, broken windows, a building at 1732 York Street, which was condemned by the building inspector.

Because of losing Mr. Axel Kaun's money — his lifetime savings, because of his losing his normal life of 10 years in Pacific Heights, Mr. Kaun died in a hopeless desperation as "homeless."

Because of Lehman Brothers, we lost all our money. They are 100% responsible for Mr. Kaun's death.

Proximate cause is an "ultimate issues" in a negligence cause, and if the facts are disputed, must be determined by jury. But where reasonable persons will not challenge the absence of casualty, the court may treat the issue as one of law and take the decision from the jury." (Thai vs. Stang, 1989 21 CA 3d 1264, 263 CR 202, 207-roller rink's failure to provide security guard was not proximate cause of patron's injuries from drive-by shooting).

The losses at Lehman Brothers put Mr. Kaun on the street and ultimately the bad living conditions caused his death. Plaintiff prays the court award not less than $1 million dollars to Plaintiff Herbert Adolph.

The value of the account was in nearly $37,000. That money was owed in 1980 to Herbert Adolph by Lehman Brothers. This amount was invested in the companies Marion Corporation and Equity Oil. Here we have the case of money had and received and in 1986 those two companies went bankrupt. Because Adolph followed the advise of his broker, Mr. Lawton at Lehman Bros. Mr. Adolph lost all his funds. The broker should be held accountable for putting clients in companies that go bankrupt. The accountability of individuals at security brokerage firms are culpable persons. Dismissal of this case under Civil Procedures 12B(c) should be denied. All allegations in this complaint should be construed in the most favorable light to the moving party. In defendants' answer, they say Mr. Adolph sued various firms for wrongdoings and they tried to make him appear a frivolous plaintiff whose case

should be dismissed. Contrary to this Mr. Adolph lost over $300,000 at Lehman Bros., lost another $50,000 at Thompson & McKinnon and at the third firm. Adolph is showing concrete financial loss because he lost all funds. Lehman is responsible for putting Adolph into the stock which went bankrupt. Adolph is an injured party by losing all his money and the various other shareholders Lehman refuses to disclose. Lehman is a national company and must have other customers who were instructed to invest in Marion. Lehman is afraid Adolph will sue under RICO, which would imply treble damages. Under the RICO statute the complaint should not be dismissed. These are not fraudulent conveyance claims.

Under Civil Procedure 12B this is not a frivolous claim because both Thompson & McKinnon and Lehman Bros. lost Adolph's $350,000. The particular stock at Thompson & McKinnon dropped from 10 to 4 in less than six months. Mr. Adolph should be made whole at law. This is his only wish. He is not a frivolous man. All his allegations are true and constructed in the most favorable light of the plaintiff. Love vs. the United States 915 F.2d 1242, 1245 9th Cir., 1989.

There is a showing of injury because of the disappearing of the money in this account.

The statute of limitations under RICO begins when a reasonable person becomes aware of the alleged conspiracy. Therefore the statute of limitations has not yet run. Mr. Adolph was told by his accountant, Ray Norton that there was another case against Lehman Brothers. This discovery was made in 1991 because there was a conspiracy to defraud him of money by the way of selling useless stock in companies that went bankrupt. There is a pattern here of alleged conspiracy.

I.

The alleged acts of the RICO Act or such act USC Title 18,

1952 include:

1. Intent to defraud

2. Conspirators, loss of property and a pattern of alleged conspiracy. Adolph's complaint therefore does not fail to state a claim upon which relief can be granted. Suits won against the Department of Health and Social Security by Adolph include $3,000 from Social Security, which payments continue to date. Another suit was settled out of court by Dean Witter for $3,000. The case against Lehman Brothers in 1982 was lost by Mr. Adolph because he was distraught due to the death of his friend. When Mr. Scallia called him, Mr. Adolph was unable to speak coherently and explain the mistakes of the judges in the lower courts. A direct verdict was granted when the opposing counsel Gaston & Snow beat my Churning claim by the introduction of Landry. They used Landry to defeata my Churninq issue.

Dated: November 6, 1992

Herbert Adolph _____
In Pro Per

A. September 30th, 1980.
Q. What was the annual sales in the account on the total of purchases?
A. For when?
Q. For this period, two-year period, '79 — '78 December and September, '80?
A. What was the value of all purchases in the portfolio?
Q. Yes.
A. About $650,000.
Q. And the net value of the account was how much?
A. At what point in time?
Q. September 30, 1980.
A. 36,900 —
Q. What was the net, that was my money?
A. That is correct. $36,976.
Q. So September, 1980, the plaintiff owed nearly 40,000?
A. No, sir. September 30 there was no money owed. There was a credit balance of $36,976.
Q. Well, the credit was my money, wasn't it?
A. Yes, sir.
Q. Okay.
This is Adolph money, yeah. Is that mine?
A. You had a credit balance in your portfolio. I assume it was your money.
Q. Sometimes I don't think experts know too much.

ARGUMENTS

I. Court does have subject matter jurisdiction:

United States District Court, Northern District of California was deceived by defendants' response into reversible error of dismissing plaintiff, Adolph's complaint before his right to due process, to discovery, to naming all the co-conspirators was exercised.

The essential fact is that RICO, Hobbs Act, USC Title 18 Statute of Limitations does not commence until victim(s) become aware of the consriracy. To intercept this action in the bud by judicial dismissal is reversible error and is not harmless error. The body of law and the body of evidence which were to be presented were and are fresh; not a rehash of the Churning/SEC case against Lehman. Plaintiff, Adolph, did not even know of the existence of RICO, Hobbs Act until consulting competent counsel in 1992, and the revealing in the press of Lehman losing a large Churning case. As the pieces of the puzzle came to light this reasonable plaintiff saw the depth of the conspiracy in 1992. Intercepting this case before even the settlement conference of 12/16/92 violates thee due process clauses and guarantees of the U.S. Constitution, 5th, 7th, 14th Amendments. Appeal requires reversal of the dismissal and a remand to the United States District Court, Northern District of California. Prae Ct. Concurr. Specifically, the reversible order was entered on 9/29/92.

CONCLUSION

This court should depart from the proceedings of the lower courts. They made errors towards jurisdiction. This supreme courts has jurisdiction. He has created magical words to invoke jurisdiction. This case justifies the court petition for writ of certiorari.

Respectfully submitted,

HERBERT ADOLPH
1732 Leavenworth St.
San Francisco, CA
(415) 929-8105

Ordered against Lucky Brands to pay Herbert Adolph 2 Million Dollars in Compensation Cost of Case.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUT
Appendix

Herbert Adlph
Plaintill-Appellant,
vs.
LEHMAN BROTHERS INC.,
Defendant-Applellee

A review of the record demonstrates that this appeal, filed November 19, 1993, is not timely as to the district court's September 22, 1992 judgement. See Fed. R. App.P. 4 (a) (1). Consequently, this appeal is dismiess for lack of jurisdiction.

OFFICE OF THE CLERK
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JUNE 3, 1993

CASE NUMBER: C-92-3525-DLJ
CASE TITLE: Adolph v. Lehman Brothers, Inc.
DATE MANDATE FILED: 6/2/93

TO COUNSEL OF RECORD:

The mandage of the United States Court of Appeals for the Ninth Circuit has been filed in the above captioned case.

Sincerely,

RICHARD W. WIEKING,clerk

by: Frances Wilson
Case Systems Administrator

Distibution: CIVIL- Counsel of Record
CRIMINAL- Counsel of Record
U.S. Marshall (copy of mandate)
U.S. Probation Office

Herbert Adolph,

Plaintiff,

v.

Lehman Brothers Kuhn Loeb,
et. al.,

Defendants.

APPENDIX

On August 28,1992, plaintiff filed a complaint apparently alleging that defendants violated the Racketeer Influenced and Corrupt Organizations (RICO) statute, the Securities Exchange Act of 1934. The complaint not only insulliciently pleads the elements necessary to state the apparent claims, it is alsc limited to actions which took place approximately ten years ago, between 1979 and 1982. Thus , assuming the above complaints are indeed being alleged, the statutes of limitations on these claims have run. The court therefore lacks subject matter jurisdiction. Pursuant to its authority under Federal Rule of Civil Procedure 12(b) (1), Neitzke v. Williams, 109 S.Ct. 1827, 1832 n.6 (1989), the Court hereby Dismmisses this action.

IT IS SO ORDERED.
Dated September 21, 1992

D. Lowell Jensen
United States District Judge

Before: HUG and THOMPSON, Circuit Judges

Appellant's motion to stay the mandate is denied. No Motions for reconsideration, rehearing, clarifications, stay of the mandate, or any other submissions shall be filed or entertained in this closed docket.